No. 20384

IN THE

United States Court of Appeals For the Ninth Circuit

BAKER & FORD CO., a corporation, and
THE FIDELITY AND CASUALTY COMPANY OF NEW YORK,
a corporation,
Appellants,

v.

UNITED STATES OF AMERICA
for the use and benefit of
URBAN PLUMBING & HEATING CO.
a corporation,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR ALASKA

HONORABLE RAYMOND E. PLUMMER, *Judge*

REPLY BRIEF OF APPELLANTS

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ARGUMENT IN REPLY

The counter-statement of the case contains certain recitations and arguments which are not supported by the evidence:

On page 4 it is argued that Baker knew the contract would be accelerated "and that additional money was available as compensation for the speed up as early as April 8, 1960." The testimony of Mr. Bernardi there referred to, merely is to the effect that discussions had been held all along in an attempt to determine the earliest possible completion dates. The evidence is clear that the last agreed-to dates were not specifically discussed until April 27th (Baker, Tr. 614-617; Bernardi, 503). This is supported by reference to Exhibit 41 dated April 28th which is an authorization to the Corps of Engineers for additional expenditures and Exhibit 25 dated April 29th being a letter from the Corps of Engineers, and Exhibit W dated April 29th being a telegram from the Corps of Engineers confirming the conversation of April 27th. It should also be pointed out with reference to the assertions in that paragraph that Mr. Baker's request for a cost proposal was based on final contract completion date of September 15th (Tr. 619-20, 640-41, 655-57). This testimony is undisputed.

The statement on page 5 that Baker gave every indication during physical construction that Urban would be compensated was not supported by the cited testimony.

On page 5 there appears the further statement:

> "At this point, of course, under the terms of the subcontract, the completion dates binding Baker became equally binding on Urban. (Ex. H; Tr. 427, 429, 431, 432)."

We find this same assertion being made on pages 10, 11 and 14 of the argument. Whether Urban was bound by new negotiated dates is a legal determination to be made from the contract between the parties (Ex. H). The undertaking in this regard is set out in the subcontract, it, reading as follows:

> "THE SUBCONTRACTOR AGREES:
>
> "(a) To assume toward the CONTRACTOR, so far as the SUB-CONTRACT work is concerned, all the obligations and responsibilities which the CONTRACTOR *assumed* toward the OWNER by the MAIN CONTRACT which includes the general and special conditions thereof, and the plans and specifications and addenda, and all modifications thereof incorporated in the documents *before their execution* (which documents shall be available to the SUBCONTRACTOR). The SUBCONTRACTOR agrees not to assign or sublet said work or any portion therof without the written consent of the CONTRACTOR.
>
> "(b) To start work immediately when notified by the CONTRACTOR, and to complete the several portions and the whole of the work herein sublet, at such times as will enable the CONTRACTOR to fully comply with the contract with the OWNER, and to be bound by any provisions in the MAIN CONTRACT with the OWNER for liquidated damages, *if caused by SUBCONTRACTOR.*" (Italics ours)

It becomes apparent from the foregoing that the subcontractor, and naturally so, is only bound by the main contract as of the time of its execution, and any subsequent modifications thereto would have to be agreed upon by the prime and subcontractor just as they would have to be agreed upon as between the prime and the owner in the first instance. And the assertion in appellee's argu-

ment (P. 14) that it could have been liable for liquidated damages must fall in the light of the language of paragraph (b) above quoted, its only obligation being to comply with the main contract as executed.

Appellee cites no law in support of its statement that Urban was bound by the modification but in each instance refers to Tr. 427, 429, 431 and 432 to support its position. A reference to those pages of the transcript indicates that this was merely a legal opinion elicited after considerable urging from Mr. Bernardi, a civil engineer.

All of Urban's witnesses testified that no directives respecting acceleration were give to Urban by Baker and Ford, these references being indexed in appellants' original brief. However, to support their contention that some directives were given we find appellee repeatedly stating that Baker told Urban "to figure the job done by September 15, (Tr. 657) and to 'get the thing speeded up' (Tr. 444; see also p. 11, McGonigal deposition at Tr. 773 *et seq.;*" This reference appears in the counter statement at page 5 and in the argument at pages 10, 11, 14, 15 and 24.

The assertion that Mr. Baker told Urban "to figure all the job completed by September 15 . . . (Tr. 657)" is a complete misstatement of the testimony. The testimony appearing at Tr. 656-57 relates to Mr. Baker's request from Mr. Brewer for a cost figure based on a September 15th completion date. The specific question and answer on cross-examination follow(Tr. 657):

"Q. Was it possible, then, that you told him, Mr. Brew-

er, to figure the costs of completing all of the outside work by September 15th?

"A. I did. I told him to figure all the job completed by September 15th which date included all the outside work."

The further reference that they were instructed to "get the thing speeded up" appears in the testimony of Mr. Bernardi. A reading of that testimony clearly indicates that this language was used in the day-to-day operations with particular reference to maintaining current schedules and not with any reference to the overall schedule. The questions and answers on cross-examination follow (Tr. 444):

"Q. Was Urban Plumbing & Heating Co. behind on this job?

"A. My personal opinion is yes.

"Q. And what did you do about it?

"A. I kept talking to them.

"Q. What did you keep telling them to do?

"A. I told them, 'Let's get the thing speeded up, let's get on with the work here.'

"Q. Then you did tell Urban more than once to speed up their work?

"A. I told them, 'Let's get it done.' I didn't tell them to speed it up in the sense you are making it.

"Q. Did you say such words as 'speed-up'?

"A. Sure. You tell everybody on the job to speed up.

"Q. And how did you expect them to accomplish that?

"A. Well I think with a little planning and with a little prefabrication. We didn't have any problem with the other contractors, sir."

The same is true of the statements attributed to Mr. McGonigal in his deposition at Tr. 773, p. 11.

On page 9 of appellee's brief the assertion is made that "appellee finds no argument as to Specifications of Error III, IV, V and VI." The court's attention is called to the fact that at pages 13 and 14 of appellants' brief, it is pointed out where the arguments respecting these Specifications of Error are to be found and the reasons therefor.

Referring to appellee's argument that an acceleration occurred, there appears the assertion at the top of page 10 that the dates established by Mod. 6 (December 15th final completion) "were a reasonable forecast of the *minimum time* necessary to complete work under 1302 *at a price fairly within the responsibilities of the parties* under the contract as originally written." (Italics ours) In support of that statement appellee cites Tr. 731, 392, 397, 400, Ex. 38, Finding VIII (R. 85). None of these references support this argument.

Tr. 731 makes no reference to his subject matter. Tr. 392, 397-8 and 400 relate to the testimony of Mr. Bernardi and on all of the referred pages he states that the Mod. 6 schedule fixed "outside dates," giving a margin, and he then fixed it at a 30-day margin. Likewise at Tr. 431 he testified that Mod. 6 was a "very lenient" schedule.

Neither does Finding VIII support this statement and Ex. 38 cited and relied on by appellee was not offered in evidence.

At page 12 of appellee's brief it is argued that various items of increased costs were included in a cost proposal from Baker & Ford to the Corps of Engineers. Mr. Bernardi's testimony (Tr. 405-410) clearly shows that the recitation of cost items in Baker & Ford's proposal was a fiction, the compensation actually being for furnishing additional camp facilities and an early evacuation of the warehouse; further, that the matter of allocation or substantiation was a function of the Corps of Engineers that Baker & Ford were not concerned with.

It is stated on page 12 of appellee's brief that "examples of loss of efficiency and resultant increased cost were cited to the court (Tr. 54)" and that "longer working hours were necessitated thereby causing doubletime wage rates and raising overall labor costs (Tr. 60-62)." A reference to page 54 of the transcript indicates that Mr. Martindale was referring to time loss occasioned by what he felt was poor day-to-day planning, not because of any acceleration, and pages 60-62 of the transcript which appellee relies on, do not "demonstrate that longer hours were necessitated thereby causing double time wage rates," Mr. Martindale merely stating that the labor hours did "run more because of the manner of doing this job." In this connection, it is interesting to note that Mr. Martindale also testified that they were required to work Sunday only on two or three occasions and in those instances with only three or four men, not a full crew (Tr. 68); further, that the difficulties encountered on this particular job were no greater than usual (Tr. 69-70).

It is true as stated on page 12 there was testimony (Tr. 116) that additional tools and equipment were required, however, there is no specification by anyone in a position to know, what these consisted of. Mr. Urban was permitted to discuss this subject but his information was neither taken from the books and records of the company nor did he have any personal knowledge. The same is true of the air freight charges which the court allowed, Mr. Urban testifying that these were furnished to him by Mr. Way, his office man, with Urban having no personal knowledge.

On pages 13 to 16 appears appellee's argument as to whether this was a voluntary undertaking on Urban's part. We reassert that Urban's undertakings to meet the Baker & Ford proposed schedule (Ex. 1) was completely voluntary. This is clearly supported by the fact that no directives were ever given to Urban by Baker and Ford personnel; there was no legal liability under the terms of the subcontract to meet a different schedule; *and the testimony of Mr. Martindale that he was advised by Baker and Ford personnel "if we could make it, fine, and if we couldn't we didn't have to."* (Referring to the scheduled completion dates) (Tr. 72-74)

Much is attempted to be made on pages 4 and 14 of the proposition that the posting of Exhibit I, the Baker & Ford working schedule, was close or "sumultaneous with" the change of construction schedule, Mod. 11. We fail to discern the point involved and are unable to determine what difference this would make even if it were true.

The fact is, however, that the schedule (Ex. I) was prepared April 8th and issued April 22nd (Tr. 64, 166, 338-9) and the first concrete discussions relating to the finally agreed upon dates were held April 27th (Tr. 503, 614-15, 618-19), and these final dates were adopted by the Corps of Engineers on April 29th (Tr. 618). The assertion appearing at page 16 that Urban knew of the existence of Mod. 11 and its terms, excepting the consideration, is not supported by any of the evidence. Mr. Brewer testified that he never knew of a speed up until February of 1961 (Tr. 110, 112, 125-26). Mr. Urban stated that he was "surprised" to learn of it in February 1961 (Tr. 274).

Appellant has asserted throughout that Mr. Urban's testimony as to the question of damage and the quantum was incompetent, his opinion not being in response to a hypothetical question and he having no knowledge of the facts. Appellee in its answering brief has simplified this issue for us. It states on page 17, "Contrary to Baker's assertion, Mr. Urban was at Clear during the course of the project there (Tr. 178, 197). He was in constant telephone communication with and reviewed memos from the job site personnel (Tr. 178, 179). *We submit this was ample qualification for him to testify as to his opinion of the damages his company incurred.*" (Italics ours). Reference to the cited testimony follows (Tr. 178, 179):

"Q. Were you at Clear during the course of this project?

"A. Yes. I made visits to Clear.

"Q. Who did you confer with on this job?

"A. With Bob Brewer mostly.

"Q. Did you confer with him on the telephone?

"A. Quite often.

(Tr. 197):

"Q. And you were down at Clear yourself I take it?

"A. Yes, and talked to the men on the job and everything."

It is to be noted from this testimony that there is no showing that Mr. Urban was at Clear during the period involved in this litigation, i.e. May 1st, 1960 to November 20th, 1960. This was not gone into by appellee because the fact is that he was not at Clear during that period of time as disclosed by the following testimony (Tr. 260):

"Q. Could you please just answer the question. Were you in Fairbanks or at Clear at this particular time which you have here in Schedule 7, when these 18 plane fares and these 18 taxi fares, and the travel pay and subsistence, and the 50% turnover—were you here at that time?.

"A. They were not all at one time, at one and the same time. They were over a period of time. I couldn't be here every time. I don't even know if I was here once.

"Q. You don't even know if you were here once?

"A. No.

"Q. Was this taken from May until the end of the job?

"A. That is correct.

"Q. I take it you consider this a fair estimate, but you weren't here at any time during it?

"A. That's a fair estimate, and also, if I recall right, I also confirmed with Mr. Brewer that we had about

that much increase in manpower."

Neither was he in "constant telephone communication" with Clear under the first quoted testimony above and the testimony does not disclose that he had "reviewed memos from the job site personnel." Appellee's attempt to qualify Mr. Urban to testify as to his opinion based on this state of the record must fall short of the requirements of the law of evidence as set forth in our opening brief.

On page 18 it is also asserted by appellee that "In the main, the estimates (of Mr. Urban) were based upon summaries of office records kept and utilized in the ordinary course of business (Tr. 144-145, 222, 237)." Analysis of the cited testimony indicates that it falls short of the legal requirements for office records or summaries thereof. Tr. 144-145 merely had reference to the *total* hours on the job (Ex. Z). No opinion evidence of Mr. Urban with respect to the question of damages or quantum relates to this exhibit. Tr. 222 merely relates to questions regarding total direct labor charges, which was not answered by the witness, the court sustaining an objection based on the fact that the elicited answer would be based on hearsay and did not come within the business records rule.

At Tr. 237 Mr. Urban was being interrogated with respect to schedule 1 of Exhibit 29:

"Q. Now, where did those figures come from?

"A. Those figures were figures that I made up from experience, and it is our method used quite often

in estimating and in negotiations with the Army Engineers in settling change orders.

"Q. All right now. Where did those figures come from? Who?

"A. I made these figures.

"Q. You made these figures yourself?

"A. Yes.

"Q. All right. Where did they come from? Just from your own head, is that it?

"A. Well, I — —"

(Interruption, and then the questioning proceeded to a different subject). So, here again we find the issues simplified by appellee's reliance on the three cited portions of the transcript to establish that all of the opinion evidence relating to the 8 schedules and summary of Exhibit 29 were "based upon summaries of the office records kept and utilized in the ordinary course of business." As shown above the first two cited references have no relation to the summaries and the last certainly does not lay a foundation for any of the requirements under the Business Records Act, 28 USC §1732a. It is most apparent that the so-called sources of information, whatever they may be, were not described and in the absence of such foundation can not be presumed to be sufficiently reliable to warrant reception of Mr. Urban's opinion evidence under the rule stated in *Standard Oil Company of California v. Moore*, 251 F.2d at page 222 cited in appellee's brief, page 19.

Two depositions of John Way and Mr. Urban are re-

ferred to on page 20 of appellee's brief together with the statement that "all materials were available for inspection by counsel for Baker" (presumably at Portland), "Much of this material was available for inspection in the courtroom" and that "appellant nowhere asserted that all were not available to it." Neither Mr. Way nor Mr. Urban's deposition was published or read into the record, and consequently, they are not a part of the record in this case. It is true that at Tr. 205-6-7 appellee's counsel states that all Urban's records were made available, however, that statement merely has reference to the records relating to the temporary sewer line, schedule 3, Exhibit 29. There was no showing whatsoever of what records were available during any depositions or at the time of trial, (Tr. 571-72) and to refute appellee's statement that we at no time claimed that all of the records were not available to appellant, we quote the following colloquy (Tr. 571-72):

> "Mr. Rinker: Your Honor, this as I say, is a business record. I would like to call the Court's attention to plaintiff's Exhibit 29, which consisted of all the schedules, in which was a listing of alleged expenses incurred in connection with air freight, rentals of equipment, and all of those things, and in no instance was there ever any invoice presented to us for our examination.
>
> "The Court: My understanding yesterday, whenever that came up, was that those were among the records that were made available to you for your inspection when you made your inspection at Portland.
>
> "Mr. Rinker: No, they were not available for our inspection at Portland.

"Mr. Davidson: They are on the desk here in the courtroom, if he wants to look at them now.[1]

"Mr. Rinker: The gas, welding, rental invoices, none of those things were available. The gas and oil, maintenance invoices, there were simply no invoices of any kind.

"Mr. Davidson: That's quite true.

"The Court: That objection wasn't raised. It wasn't brought to my attention yesterday, because when this came up it was my understanding that those were, in fact I inquired of Mr. Davidson if those were among the records that were available when you inspected them in Portland.

"Mr. Rinker: That was that one schedule, I believe, Your Honor.[2]

The language in Jones on Evidence, Volume 1, 244, p. 472, is instructive in this regard,

> "To the application of this rule (summaries) it is essential that the original records or items be first duly identified and that a sufficient foundation be laid so as to entitle the records or writings themselves to be admitted in evidence. Also the admissibility of the records themselves as evidence must be established and they must be available to the opposite party for cross-examination."

Appellee's argument seems to be that because depositions were taken in Urban's office and because books and records were available in that office it was incumbent upon appellant to anticipate what summaries would be presented at the time of trial and to acquaint themselves fully with all books and records. The speciousness of this argument does not justify further response. The rule is well established as set forth by the court at page 575,

1. This reference is to Schedule 3 which is not at issue in this appeal.
2. Relating to Schedule 3 which is not at issue in this appeal.

576 and 577 of the transcript that the original records must be identified and must be available for cross-examination. In fact, based on that rule, the trial court would not permit appellant to introduce into evidence a summary, Exhibit JJ, until they produced the original records from which the summary was made, necessitating a special trip to Bellingham and return to Fairbanks during the course of the trial.[3] Patently, we have as to all of Exhibit 29 and Mr. Urban's testimony in support thereof, the admission of summaries without any identification, qualification or production of the records from which the summaries were made.

With respect to damages, it is apparent throughout appellee's argument and the court's memorandum decision and findings, that they have approached this entire matter from the point of view that if appellant received consideration for a modification to the extent of $146,000.00, the appellee is *ipso facto* entitled to a certain portion therof. This, notwithstanding both appellee and the trial court recognize that the contract between the parties hereto is separate and apart from the main contract and if there is a modification of the subcontract the compensation therefor is based on quantum merit irrespective of what, if any, consideration passed under the main contract.

As to whether there was a waiver of the contract requirement that extras be previously agreed upon in writing, we agree with the quoted testimony on page 24 that

3. The court did admit the exhibit first (Tr. 576) but then reversed itself (Tr. 578) and rejected it until the original records were made available.

verbal orders were given throughout the course of the job, however, there is no showing that any verbal *change orders* were given on this job during the course of construction. The only orders for extras referred to by appellee (Tr. 58) were for trailer camps and barracks which were temporary work and not a part of this contract (Tr. 118-120).

Connection of Kitchen Equipment (Appellee's Brief, 26)

Appellee states that "time sheets and material costs fairly reflecting the additional changes necessary were kept (Tr. 37, 41, 42, Tr. 94-95). The court's award was in accord with this figure (Ex. 21, Finding VII(a))".

Reference to Tr. 37 shows that the time sheets, Exhibit 21, were not identified. Mr. Martindale was merely asked whether he kept time and whether the sheets kept accurately reflected the time he kept for the work to which his answer was in the affirmative. Exhibit 21 was never referred to.

The transcript reference to pages 41 and 42, relates to the next subject, refrigeration equipment, not the instant subject.

With respect to the next reference, Tr. 94-95, Mr. Brewer was directed to Exhibit 21 as well as Exhibit 19 (relating to refrigeration equipment) and the only substantive evidence respecting Exhibit 21 was as follows:

"Q. Do these invoices and time sheets represent additional costs in connecting the kitchen equipment and drains for the refrigeration equipment?

"A. Yes. To the best of my knowledge they do. There

> is possibly a portion of this in here for moving the kitchen equipment into place which was outside the scope of our contract."

The court gave judgment for the amount set forth in Exhibit 21. It is obvious that includes extra work outside of the contract. Neither is there a showing of any knowledge on the part of Mr. Brewer of what was done or required in this regard.

Connecting Water Lines and Drains to Refrigerators (Appellee's Brief, 26)

Appellant stands corrected insofar as its opening brief is concerned. It appears that Exhibit 19 was identified by Mr. Martindale for Urban as fairly reflecting the costs, however, this obviously was not "extra work" under the contract.

Installation of Grease Interceptor Extensions (Appellee's Brief, 27)

The statements in appellee's brief herein are completely without foundation under the evidence. The first sentence relies for its support on Tr. 44 and page 7, deposition of John Way. This is the second reference in appellee's brief to the deposition of John Way. This deposition was not read into the record or published and is not a part thereof and the testimony at Tr. 44 merely indicates that there may have been a faulty design by the architect requiring some fitting.

Appellee refers to testimony at Tr. 45 and concludes that "someone apparently connected with Baker, contacted Urban and told it to put the interceptors on." This is an inference completely unsupported by that reference,

it reading as follows (Mr. Martindale testifying):

"Q. Now, did you have any discussion with anybody about this problem of the grease interceptors and what to do about it?

"A. No. I was sent that information from Portland, from Urban Plumbing & Heating's office in Portland, that someone had contacted them and they would have to put them on, so they sent them up and we put them on."

The next reference in appellee's brief is "certainly, Baker & Ford knew of the problem, (Ex. U)." Reference to Exhibit U indicates that it is a letter written by Baker & Ford to Urban in November 1961, one year after the job was completed, rejecting the billing tendered by Urban.

Appellee then goes on to say, "records were kept of the time spent on the job and were turned into Urban (Tr. 45, see Ex. 16) and invoiced to Baker. These constituted the basis of the court's award (Finding VII(c))." As to this, testimony at Tr. 45 merely is to the effect that a recrod of time was kept and turned into Urban by Martindale. This record was never produced or offered. Exhibit 16 is an invoice to Urban from Peerless Pacific Company for what we do not know. This invoice was admitted as part of the pretrial proceedings but was never identified or referred to in the record. It is also interesting to note that the amount thereof is $1,476.90 whereas the court's award (Finding VII(c)) was in the sum of $2559.00.

Repairing Water Main Leaks (Appellee's Brief, 27)

This subject requires little amplification above that in our opening brief.

However, with respect to jurisdiction we should point out the following: On page 28 appellee states "the admitted facts demonstrate an adequate basis for diversity jurisdiction (R. 22-23, see R 1 & 2)." R. 22 and 23 refer to the pretrial order and R 1 and 2 refer to the original complaint. These were superceded by supplemental complaint (R. 33-38) and answer to supplemental complaint (R. 41-42) wherein the jurisdictional question became an issue per the court's order (R. 39-40).

The court found (Finding VII(d)) that judgment could run only against Baker & Ford as to this item it not having jurisdiction under the Miller Act but asserting ancillary jurisdiction (R. 91), because this work was separate and apart from Contract 1302, it being a part of Contract 1282, with which Urban was not involved (Tr. 499). The finding is fatal in three regards:

(a) The amount $2586.00, is not sufficient to give the court jurisdiction even though there be a diversity of citizenship, 28 USC 1331.

(b) This cause of action is in no wise ancillary or supplemental to the principal cause. 54 Am. Jur., United States Courts, paragraph 32.

(c) It does not fall within the doctrine of pendent jurisdiction as asserted in appellee's brief. Nor do the authorities at 5 A.L.R.3rd 1040 quoted in appellee's brief support jurisdiction. See *U. S. Use of Flow Engineering Inc. v. Continental Casualty Company* (1961) (DC NJ) 195 F. Supp. 177. The other cited case therein, *Brown & Root, Inc. v. Gifford Hill & Company*, (1963, CA 5 La.) 319 F.2d 65 merely holds that if the Miller Act

claim is not unsubstantial or not frivilous but for some reason does not come within the Miller Act, the court may proceed to adjudicate it. This particular claim very clearly was never a part of Contract 1302 thus within the Miller Act and was never claimed to be by the appellee.

With respect to appellee's argument as to interest appearing on page 30, we would point out that the trial court, in Finding V (R. 83) determined that the contract was still open and in effect during October 1961, else how could there be a modification thereto, and in Finding VI (R. 84) determined that final settlement had not been made thereof as of February 21, 1963, if at all. Therefore, it becomes apparent that Urban's work under the subcontract was not completed until October 1961 and,

> "Final payment shall be made within a reasonable time after the completion and acceptance of the subcontract work . . ." (Ex. H)

and interest therefore should not have been computed from a date earlier than November 16th, 1961.

With respect to the subject of attorney fees, page 33 appellee's brief, it is correct in stating that the quoted language appearing on the bottom of that page does not appear in *Macri & Sons v. U. S.*, 313 F.2d 119 (9th CA 1963), erroneously cited. The correct citation is *USA for General Electric Company v. Brown Electric Company*, (DC Va. 1959) 168 F. Supp. 806.

At page 32, appellee's brief, it assumes an accusatory role with respect to appellants for "appellant's wholly gratutious insinuation that the trial judge was guilty of misconduct or that his decisional faculties were somehow

disrupted by the Alaska earthquake." This language is appellee's, not appellant's. Appellant's assertion throughout has been that the trial court erred substantially in its memorandum decision, which it ultimately partially corrected; and that it then entered findings which did not even conform to its corrected memorandum decision; and that it erred in its treatment of the evidence adduced on behalf of appellee. We are not confronted in this case with a question of credibility of the witnesses for we find no substantial conflict therein. The question posed to the trial court and this court on review is the legal sufficiency of the evidence to support the findings and conclusions. We submit that on the basis of the detailed analysis of that testimony, appellee fell far short of sustaining its burden.

Appellants at no time have asserted "misconduct" on the part of the trial court. Appellants have and do insist that the trial court committed substantial error which, of course, is a prerequisite to appellant's right to have this record reviewed. If our attempt to rationalize or explain the erroneous and inconsistent treatment of the evidence was in any wise injudicious, we certainly apologize to all concerned, including able counsel for appellee.

CONCLUSION

The judgment of the district court should be reversed and appellee's action dismissed as originally prayed for herein.

Respectfully submitted

Mike Stepovich
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Attorneys for Appellants

CERTIFICATE

We certify that, in connection with the preparation of this brief, we have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in our opinion, the foregoing brief is in full compliance with those rules.

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